No. 79-1734

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT PARRATT and FRANCIS LUGENBILL,

Petitioners,

—v.—

BERT TAYLOR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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INTEREST OF AMICUS CURIAE*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 200,000 members dedicated to the protection of the civil rights and liberties of Americans. Since its founding in 1920, one of the constant concerns of the ACLU has been the need to provide adequate legal mechanisms to protect against, and remedy, violations of constitutionally protected rights. Foremost among those mechanisms are the sanctions available under §1983 against those state officials who abuse their office or are indifferent to the rights of those they are supposed to serve.

Amicus has frequently appeared before this Court in support of the historic role of 42 U.S.C. §1983 in remedying violations of federal civil rights, and in deterring

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*Letters of consent from all parties to the filing of this brief are being lodged with the Clerk of the Court.

departure from constitutional standards. We submit this brief amicus curiae to urge the Court to preserve the role of §1983 in enforcing fidelity to the constitutional obligations of state officials entrusted with public power.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons presented in respondent's motion to dismiss the writ as improvidently granted, previously denied at least pending argument by this Court, amicus believes this Court no longer has power under Article III to render a judgment in this case, and there is certainly no need to do so.

Although we do not here brief the issue, we also believe the recent enactment of an administrative exhaustion requirement applicable to cases such as this, 42 U.S.C. §1997e (1980), renders

consideration of this case inappropriate.[1/] Because "a court is to apply the law in effect at the time it renders its decision," Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974), state authorities should be given the opportunity Congress has now created and defined in §1997e to administratively remedy respondent's loss. This would not only implement the Congressional will, but quite possibly avoid unnecessary constitutional adjudication by obviating the need to decide the Constitutional question whether the facts in respondent's §1983 claim amount to a

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[1/] See generally Brief for the National Prison Project of the American Civil Liberties Union Amicus Curiae in Jenkins v. Brewer, No. 80-546.

Constitutional violation.[2/]

Should the Court reach the merits of this case, however, we believe it should decline to hold that more than "simple negligence," or indeed any state of mind whatsoever, must be proven in all §1983 cases.

A §1983 claim is made out if plaintiff proves that some person deprived him of a federal right, and that the person who has deprived him of a federal right acted under color of law. Gomez v. Toledo, 64 L.Ed.2d 572 (1980). As we have previously urged in briefs relied upon by this Court,[3/] although particular

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[2/] The grievance resolution plan required under §1997e(b) would provide for the resolution of respondent's grievance whether or not the loss of his property rises to the level of a Constitutional deprivation, and regardless of the petitioners' state of mind.

[3/] See briefs for the American Civil Liberties Union Amicus Curiae in Procunier v. Navarette, No. 76-446, and Baker v. McCollan, No. 78-752.

violations of federal rights may themselves require proof of particular states of mind, see, e.g., Estelle v. Gamble, 409 U.S. 27 (1976)(allegation of deliberate indifference necessary in Eighth Amendment medical care case), §1983 itself contains no independent state of mind requirement. Gomez v. Toledo makes clear that the question presented here, "whether simple negligence...may form the basis of a judgment under 42 U.S.C. §1983," is the wrong question. (Point I.)

The legislative history conclusively demonstrates that Congress did not require proof of a state of mind in making out all prima facie §1983 cases. (Point II.) Considerations of policy do not convincingly argue for imparting a state of mind requirement into the §1983 prima facie case beyond its current role in the good faith defense, and §1983 will not

become a generalized tort law in the absence of a state of mind element. (Point III.)

We do not here address the additional question whether respondent has properly pleaded and proven the first element of his §1983 claim, that is, whether petitioners' actions did in fact deprive him of a Constitutional right, a question which, as we have shown, implementation of 42 U.S.C. §1997e would pretermit. We confess to finding that a difficult question. We are certain, however, that if petitioners are to prevail, it should be on that ground, not because some additional state of mind element allegedly required by §1983 itself has not been properly alleged or proven.

I. THIS COURT HAS RECOGNIZED THAT SECTION 1983 DOES NOT REQUIRE PROOF OF DEFENDANT'S STATE-OF-MIND TO ESTABLISH LIABILITY.

Although this Court has held that proof of specific intent is not necessary to state a cause of action under 42 U.S.C. §1983, Monroe v. Pape, 365 U.S. 167, 187 (1961), it has never expressly decided whether negligent conduct is actionable under the statute.[4/] However, in various decisions construing §1983, the Court has set forth the elements of a §1983 action. In none of these decisions has this Court required a party to plead or prove a degree of culpability greater than negligence to state a cause of action under §1983. In fact, this Court's decisions consistently indicate that §1983

[4/] This Court has previously granted certiorari on two occasions to consider the requisite standard of culpability for Section 1983 liability. Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 555 (1978). However, the Court decided both cases without reaching the issue.

does not require a party to prove any state of mind, so long as the defendant deprived him of constitutional rights. Instead, subject only to a good faith defense, §1983 imposes strict liability for constitutional violations caused by a person acting under color of state law.

Just last term, this Court held that a plaintiff in a §1983 action need not allege that the public official is not entitled to a qualified immunity in order to state a claim for relief. Gomez v. Toledo, 64 L.Ed.2d 572 (1980). In rejecting any requirement that the plaintiff plead the bad faith of the defendant, the Court set forth the two elements of a §1983 action:

> By the plain terms of Section 1983, two - and only two - allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of a federal right acted under color of state or territorial law. 64 L.Ed. 2d at 577.

Earlier decisions of this Court have similarly noted that the only elements of a §1983 action are (1) the deprivation of a federal right, and (2) that the deprivation is caused by a person acting under color of state law. See, e.g., Monroe v. Pape, 365 U.S. 167, 171 (1961)("Allegations of fact constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies...the requirement of RS §1979

[42 U.S.C. §1983]); [5] Douglas v. Jeanette, 319 U.S. 157, 162 (1943)("Allegations of fact sufficient to show deprivation of the right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state a cause of action under the Civil Rights Act, whenever it

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[5] It is noteworthy that the dissenting opinion by Justice Frankfurter in Monroe, 365 U.S. at 202-259, did agree with the majority that conduct actionable under §1983 should not be limited to actions infused by certain mental states. Observing that the specific intent requirement established in Screws v. United States, 325 U.S. 91 (1944) was largely a fiction diluted "in practice to mean no more than intent without justification to bring about the circumstances which infringe...rights," Justice Frankfurter concluded as to this point,

> If the courts are to enforce [§1983], it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation...Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient. Monroe, 365 U.S. at 207-208.

appears that the abridgement of the right is effected under color of a state statute or ordinance.")

In Baker v. McCollan, supra, this Court granted certiorari to determine whether negligent conduct is actionable under §1983. Although the Court did not decide the question, it suggested in dicta that §1983 does not itself impose any state-of-mind prerequisite to liability:

> [W]e have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under §1983...may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of of §1983 action. 443 U.S. at 139.[6/]

[6/] In a subsequent footnote, Justice Rehnquist observed that although §1983 does not appear to require plaintiff to prove defendant acted culpably, "the state-of-mind of the defendant may be relevant on the issue of whether a constitutional violation has occurred in the first place..." 443 U.S. at 140 n.1.

Justice Powell, in his dissent from this Court's recent holding that municipalities are not entitled to a qualified immunity in actions under §1983, Owen v. City of Independence, Missouri, 63 L.Ed.2d 673 (1980), read Owen as deciding that absent a good faith defense, state-of-mind plays no role in §1983 itself.[7/] And the Court itself acknowledged that, apart from the affirmative defense of good faith, §1983 imposes a form of strict liability on "persons" who, acting under color of state law, cause constitutional violations:

[7/] "[T]he Court holds that municipalities are strictly liable for their constitutional torts." 63 L.Ed.2d at 702.

> [A] municipality has no discretion to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a §1983 action, it does not seek to second-guess the "reasonableness' of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to requirements of the Federal Constitution and statutes. 63 L.Ed.2d at 692. 8/

8/ Having struck a balance between the need for vigorous administration of the laws and the need to protect constitutional rights by adopting essentially a negligence standard for the good faith defense for individuals, there is no need, and it makes no sense, to re-import those considerations into plaintiff's prima facie case. Moreover, since the only officials who could be absolved from liability by the good-faith defense are those against whom plaintiffs have made out no more than a case of negligience (if plaintiff has proven malice, he has disproven subjective good faith; if he has proven gross or reckless disregard, he has disproven objective reasonableness), it is apparent that a prima facie §1983 case can be made out even when the deprivation is not more culpable than "negligent".

This is not to say that negligence would be a proper standard for prima facie liability for deprivation of all constitutional rights. Some constitutional rights are defined in terms of a particular mental component. For example, the Eighth Amendment's protection against "cruel and unusual" punishment implies by its terms that a certain mental state is a prerequisite to its violation. Consequently, in Estelle v. Gamble, 429 U.S. 97 (1976), the "infliction of unnecessary suffering" upon prisoners by denial of medical care was held to amount to a violation of the Eighth Amendment, cognizable under §1983, only where such pain was inflicted through "deliberate indifference" to serious medical needs of prisoners. 429 U.S. at 104. On the other hand, because the text of the Fourth Amendment establishes a right to be free from unreasonable searches and seizures, not just from

malicious or reckless ones, this Court has held that in a §1983 action alleging illegal arrest, a plaintiff can get his case to a jury by simply showing that the official's conduct was objectively unreasonable, and not legally excused. See Monroe v. Pape, supra, and Pierson v. Ray, 386 U.S. 547 (1967). In a variety of other cases too, this Court has held the elements of a §1983 action properly pleaded or proven without inquiring into the state-of-mind with which constitutional rights were violated. See, e.g., Reynolds v. Sims, 377 U.S. 533 (1964); Goldberg v. Kelly, 397 U.S. 254 (1970); Abington v. Schempp, 374 U.S. 203 (1963); Owen v. City of

Independence, supra.[9/]

II. THE LANGUAGE AND LEGISLATIVE HISTORY OF 42 U.S.C. §1983 CONFIRM THAT THE STATUTE IMPOSES NO CULPABILITY REQUIREMENT.

By its very terms, §1983 imposes no state-of-mind requirement for liability. The statute provides, without qualification, that every person acting under color of state law, who

> subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured....

[9/] We note that state-of-mind will generally enter a §1983 case only once. When violation of a constitutional right does not itself require proof of state-of-mind, state-of-mind is part of defendant's affirmative defense of good faith. Where culpability is part of plaintiff's case, as in Estelle v. Gamble, supra (reckless indifference), successful proof of plaintiff's case will generally be inconsistent, as a matter of law, with the good faith defense.

The language of the statute accurately reflects the intent of the legislature which passed §1 of the Civil Rights Act of 1871, the direct ancestor of 42 U.S.C. §1983. The legislative history plainly indicates that Congress intended §1983 to afford a civil remedy for any and all violations of federally protected rights caused by state actors, without regard to the culpability or state-of-mind of the person who caused the violation. Senator Edmunds, the manager of the bill in the Senate, stated that Section 1 of the Act was "so very simple and really reenacting the Constitution." Cong. Globe, 42d Cong., 1st Sess., 569 (1871)[cited in Monell v. New York City Dept. of Social Services, 436 U.S. 658, 685 (1978)]. Similarly, Representative Bingham declared the bill's purpose to be

> the enforcement...of the Constitution on behalf of every individual citizen of the Republic...to the extent of the rights guaranteed to him by the Constitution." Globe App. 81 [cited in Monell, 436 U.S. 658, 685 n.45].

Representative Dawes, speaking in support of the Act, submitted that Section 1 provides a remedy for any violations of the Constitution, without limitation:

> The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject matter of the bill. They are not defined in it, and there is no attempt in it to put limitations upon any of them; but whatever they are, however broad or important, however minute or small, however estimated by the American citizen himself, or by his Legislature, they are in this law....No subject for legislation was ever brought before the American Congress so broad and comprehensive.... Globe at 475 (emphasis supplied).

* * * *

> Whatever they be, he...who invades, trenches upon or impairs one iota or tittle of the least of them, to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor. That covers...all there is in the first sections of this bill.
> Globe at 476.

In remarks cited by this Court in Monroe v. Pape, 365 U.S. 167 (1961), Mr. Arthur plainly indicated that §1 did not insulate negligent actions of state officials. As this Court noted:

> The speaker, Mr. Arthur of Kentucky, had no doubt as to the scope of §1; '[I]f the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and immaculate as a seraph, for a mere error in judgment [he is liable]'
> ....
> 365 U.S. 167, 174 n.10 (emphasis in original).

Even the opponents of the Act recognized that it did not require more than proof of a constitutional violation caused by one acting under color of state law. Indeed, one of the bases for opposition to Section 1 was that it imposed liability for any violation of the Constitution without any limitations on such liability. As Senator Thurman, opposing the bill, stated:

> It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal Courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal Courts instead of its being prosecuted as new in the court of the States....

> [T]here is no limitation whatsoever upon the terms that are employed (in the bill), and they are as comprehensive as can be used. Globe App. at 216-217 (emphasis supplied). [Cited in part in Monell, 436 U.S. 658, 685 n.45 and in Monroe, 365 U.S. at 179-80].

Engrafting a state-of-mind requirement upon §1983 would not only be contrary to the terms of the statute and the intent of the legislature; it would violate the legislature's instruction that the statute should be broadly and liberally construed. Representative Shellenbarger expressly described how the courts should interpret §1:

> The act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own

> Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people...Chief Justice Jay and also Story say:
>
> > 'Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws.' - 1 Story on Constitution, sec. 429.
> > Globe App., at 68.
> > [Cited in Monell, 436 U.S. at 684.]

This Court has recognized and followed the command of the legislature. As it noted in Gomez v. Toledo, 64 L.Ed.2d at 576-77,

> As remedial legislation, §1983 is to be construed generously to further its primary purpose.

In Monell, this Court relied on the legislature's instruction to broadly construe §1 when it refused to hold that municipalities were excluded from the "persons" covered by the 42 U.S.C. §1983. This Court held that

> absent a clear statement in the legislative history supporting the conclusion §1 was not to apply to the official act of a corporation - which simply is not present - there is no justification for excluding municipalities from the 'persons' covered by §1. Monell, 436 U.S. at 700-701.

There is no clear statement in the legislative history supporting the conclusion that §1 was not to apply to constitutional deprivations unless the violations were caused with a particular evil state-of-mind. Indeed, the clear statement of the legislature is that §1 provides a remedy for any violation of

the Constitution. So far as §1983 itself is concerned, the state-of-mind with which a defendant violated the Constitution, if he did so, is irrelevant. Gomez v. Toledo, supra.

III. EVEN IF THE COURT WERE FREE TO DISREGARD CONGRESSIONAL INTENT, THERE ARE NO POLICY REASONS TO DEPART FROM THE REASONABLENESS STANDARD OF CONDUCT IN FEDERAL CIVIL RIGHTS ACTIONS.

The law of negligence is predicated on the social policy that members of society should be held to an objective standard of reasonable caution concerning the possibility of harming others. Compensatory liability is imposed on persons who harm others while engaged in "conduct which involves an unreasonably great risk of causing damage." W. Prosser, Law of Torts, §31, p.145 (4th Ed. 1971). "The real basis of negligence is not careless-

ness, but behavior which should be recognized as involving unreasonable danger to others." Id. Adoption of a greater-than-negligence standard for actions under §1983 would hold a state officer who engages in conduct involving a risk of causing a deprivation of a citizen's constitutional rights to a lesser objective standard of reasonable caution than that to which the rest of society is held.

There is no valid justification for deterring constitutional violations less vigorously than other harms are deterred. We should expect our state officials to exercise their authority with at least the degree of care as that of a "reasonable" individual in their position and to avoid behavior involving unreasonable danger to others, especially where the officer's actions place a citizen's con-

stitutional rights at risk.[10] Indeed, in light of the substantial and increasing power government officials exercise over individual citizens, the suggestion that the standards set for government officials should be less than those established for

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[10] It has been argued that if state officials may be held personally liable, capable personnel would be deterred from accepting government jobs. The complete response to this argument was set forth in Wright v. McMann, 460 F.2d 126, 135 (2d Cir. 1972):

> We are not moved by the suggestion that if we uphold liability today competent people tomorrow will refuse to become superintendants....In the unlikely event that a prospective superintendant in fact turns down an offer for fear of personal liability, we think that the position is better filled by someone determined to supervise the facility so as to prevent the type of inmate treatment giving rise to this lawsuit.

Establishment of a qualified immunity for state officers whose actions are reasonable is an adequate response to the concern that capable persons will be deterred from accepting government jobs because of the specter of monetary liability. Wood v. Strickland, 420 U.S. 308, 320-21 (1975).

their counterparts in the private sector is astonishing. To permit the guardians of the government's power over individuals to exercise that power without regard to the risks of violation of constitutional rights would invite further deterioration of the fundamental belief that ours is a "wise and frugal government, which shall restrain men from injuring one another, [and] which shall leave them otherwise free to regulate their own pursuits of industry and improvement...." Thomas Jefferson, First Inaugural Address, March 4, 1801.

Nor will failure to insert an independent state-of-mind element in §1983 itself flood the courts with non-essential litigation. In Paul v. Davis, 424 U.S. 693 (1976), this Court expressed its concern that if all injuries inflicted

by a state official were deemed constitutional violations, the federal courts would be overwhelmed with cases that ought to be tried as state law torts. However, the Court did not then and should not now react to that concern by holding that negligent violations of civil rights by state officials can never suffice to state a cause of action under 42 U.S.C. §1983. As illustrated above, there is no support in the text or legislative history of §1983, the Constitution, the prior holdings of this Court, or sound policy for such a holding. Moreover, although a per se rule against "negligence" actions brought under §1983 might seem a convenient means of keeping state court tort actions out of federal courts, the proper application of existing principles of §1983 jurisprudence will necessarily have the same effect.

First, Paul v. Davis itself illustrates how the requirement that the plaintiff be deprived of a federally protected right avoids a wholesale conversion of tort actions into §1983 claims. In Paul, the court inquired whether plaintiff had been deprived of a federally protected right, as §1983 expressly requires, and found that he had not. See also Baker v. McCollan, supra; Martinez v. California, 444 U.S. 277 (1979).

Second, as illustrated supra, focussing properly on §1983's requirement that the deprivation take place "under color of state law" also limits §1983 to its intended purpose, and excludes from federal jurisdiction those tort cases that should properly be litigated only in state courts. The fact that the offender is a state official does not

automatically establish that his acts are necessarily committed "under color of state law." As the court said in Monroe v. Pape:

> The essential element of this type of §1983 action is abuse of his official position. 365 U.S. at 172 (emphasis added).

Finally, careful attention to, and development of, the existing requirement that the risk of injury to a federally protected right be reasonably foreseeable will preclude litigation under §1983 of general state tort law claims, without the necessity of developing a new standard of prima facie liability which would require assessment of a public official's subjective mental state.

CONCLUSION

For the reasons stated in the Introduction, the writ should be dismissed as improvidently granted. In the alternative, for the foregoing reasons, the Court should hold that §1983 does not itself impose on plaintiffs the burden of proving that defendants acted with any particular state-of-mind.

Respectfully submitted,

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